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CHARLES H. HARRIS

IN THE  
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

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No. 344

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O. V. KESSLER,  
*Petitioner,*

v.

THOMAS F. MCGLOTH, SR., Executor, Fauquier National Bank,  
Administrator, C.T.A. of the Estate of Rose Meredith  
Kessler, Deceased; THOMAS F. MCGLOTH, ROBERT  
MCGLOTH, THOMAS F. MCGLOTH, JR., MABEL MCGLOTH,  
EDWARD B. MCGLOTH, and AGNES J. KREW,

*Respondents*

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PETITION FOR REHEARING OF PETITION FOR WRIT  
OF CERTIORARI TO THE SUPREME COURT OF  
APPEALS OF THE STATE OF VIRGINIA

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MARCUS BORCHARDT,  
*Counsel for Petitioner.*



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1. The first part of the paper discusses the importance of the study of the history of the United States. It is argued that a knowledge of the past is essential for a full understanding of the present and for the development of a sound policy for the future.

2. The second part of the paper is devoted to a discussion of the various factors which have influenced the development of the United States. These factors include the geographical location of the country, the character of the people, the nature of the government, and the influence of foreign powers.

3. The third part of the paper is a critical examination of the various theories which have been advanced to explain the development of the United States. It is shown that each of these theories has its own merits and its own limitations, and that a complete understanding of the development of the United States requires a consideration of all of them.

4. The fourth part of the paper is a summary of the main points of the paper. It is concluded that the study of the history of the United States is a most important and interesting task, and that a knowledge of the past is essential for a full understanding of the present and for the development of a sound policy for the future.

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**PETITION FOR REHEARING OF PETITION FOR WRIT  
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The petitioner for a rehearing of the petition for writ  
of certiorari respectfully represents to this Honorable  
Court as follows:

**GENERAL**

On November 8, 1948, the petition for writ of certiorari  
herein was denied. The facts, of course, will not be restated  
except for the purpose of clarifying certain of the questions  
involved.

A suit was filed by the petitioner in the Circuit Court of Prince William County, State of Virginia, against the personal representatives of Rose Meredith Kessler, who died shortly after a decree for divorce was entered in her behalf in the State of Florida, the Virginia suit having been filed by the petitioner as the husband of the said Rose Meredith Kessler (R. 10).

A special plea was filed by the respondents (R. 12), alleging that the petitioner had no standing in the litigation by reason of the decree for divorce entered against him on July 16, 1946, in Dade County, State of Florida—and a replication thereupon was filed by the petitioner (R. 14), which specifically set forth “that the alleged divorce was void and of no effect in the State of Virginia”, thereby raising a federal question.

In the brief filed by the respondents in opposition to writ of certiorari, counsel for respondents allege that the petitioner lays jurisdiction of this Court only under Section 1257 (3) of the Federal Judicial Code, whereas the jurisdiction is invoked under Title 28, Section 2101c of the U. S. C. (formerly Title 28, U.S.C.A., Section 344 (b)), as set forth in the original petition; and counsel for respondents further allege that no federal question is presented by the petition filed in this cause.

Of course, this Honorable Court does have jurisdiction, as not only is a federal question presented, but consideration of public policy forbids the recognition of the fraudulent affidavit by Rose Meredith Kessler, now deceased, that was filed in the divorce proceedings in Florida, in order that proper recognition be given to service by publication in said proceedings,—and the state court recognized this affidavit notwithstanding the fraud.

### **JURISDICTION**

With respect to the matter of a “federal question”, counsel for respondents stated at the hearing in the Virginia

Court, which was predicated upon the pleadings, that the question before the Court was whether the Florida divorce decree was "entitled specifically to full faith and credit in this (Virginia) Court" (R. 19) under the Full Faith and Credit Clause of the Constitution (Art. IV, Sec. 1). As stated in the original brief filed herein, the questions for adjudication were (1) whether the Full Faith and Credit Clause of the Constitution should apply to a Florida divorce decree where the petitioner not only had no notice at his last known address of the institution of the suit in the State of Florida, but where a fraudulent affidavit was filed in order to give validity to service by publication, and (2) whether the Full Faith and Credit Clause should apply in divorce proceedings where there was no participation whatsoever by one of the litigants, which condition, under the decisions of this Court, was held to be a prerequisite to the validity of the decree.

In support of the position of the petitioner in opposing the validity of the decree, the petitioner incorporated in the Transcript of Record, filed herein, the entire Florida divorce proceedings (R. 101-161), which definitely show both lack of proper legal notice to the petitioner of the institution of the divorce suit in Florida, and lack of participation in any manner whatsoever by the petitioner, in the said Florida divorce proceedings.

The position of the petitioner, with respect to the "federal question", is specifically upheld in the following cases decided by this Honorable Court:

In the case of *Medberry et al v. State of Ohio*, 24 Howard (65) 413, it was held that the federal question *may be ascertained from the pleadings*.

In the case of *Schuylkill Trust Co. v. Pennsylvania*, 296 U. S. 113, it was held that whether a point was raised in the state court was itself a federal question and to determine the matter the United States Supreme Court was bound to examine the entire record.

In the case of *Hammond v. Whittredge*, 204 U. S. 538, it was held that the jurisdiction of the United States Supreme Court may be invoked where the defendant claimed rights under a federal statute, and that statute was referred to in and was an element of the decision of the state court.

In the case of *U. S. v. Bank of N. Y. and T. Co.*, 296 U. S. 463, it was held that a state decision contrary to federal law may be reviewed.

And in the case of *Honeyman v. Hanan*, 300 U. S. 14, cited in the brief of respondents filed herein, it was held that whether the record of a state court shows that a federal question was presented and necessarily determined, is of itself a federal question.

In the decision of the trial court (R. 97), it was specifically held that "this court (Virginia Court) would have to recognize that divorce (Florida divorce)" under and by reason of the Full Faith and Credit Clause of the Constitution.

### **FRAUDULENT AFFIDAVIT OF ROSE MEREDITH KESSLER**

With respect to the affidavit of the late Rose Meredith Kessler (R. 104) to the effect that "after diligent search and inquiry, the residence of the defendant as particularly as is known to the affiant is Washington, D. C.", which was filed pursuant to the requirement of the Florida statute (R. 158), and which was a fraudulent affidavit, and *for reasons of public policy its consideration and recognition is forbidden*. It was so held in the case of *Hellmuth v. Hellmuth*, 69 Appeals D. C. 64, wherein service in a divorce case was obtained by publication instead of attempting to secure actual service upon the opposing litigant, and the Court stated, "It is quite proper to recognize the decree as a matter of comity *unless* consideration of public policy forbids such recognition." The ruling in this case was sub-



sequently upheld by this Court (305 U. S. 597 and 305 U. S. 673).

Certainly the fraud perpetrated by the late Rose Meredith Kessler in falsifying the affidavit by stating "that after diligent search and inquiry, the residence of the petitioner as particularly as is known to the affiant (Rose Meredith Kessler) is Washington, D. C.", is sufficient from a standpoint of public policy to forbid its recognition.

The Trial Court (R. 98) referred to the three letters that were written by Rose Meredith Kessler to the petitioner at his home at 5719 Third Street South, Arlington, Virginia, just before the said Rose Meredith Kessler left Virginia for the State of Florida for the purpose of instituting divorce proceedings, the letter of January 25, 1946 (R. 137-138) having been written just ten days before her departure for Florida on February 5, 1946 (R. 78)—and stated "It is true that Mrs. Kessler wrote certain letters to the address in Arlington County; but it is not in evidence at all that she knew whether they were ever received or not. There certainly is no acknowledgment of those letters having been received."

The petitioner himself testified (R. 73) that they were received by him "at 5719 Third Street South, and they are in Mrs. Kessler's handwriting and from her box No. 2 in Gainesville". Certainly this is conclusive evidence that the petitioner actually received these letters and shows beyond any question of a doubt that the affidavit in support of her notice by publication was conceived of fraud and nothing else, and this fact in itself would justify this Honorable Court in granting certiorari in the present matter.

### CONCLUSION

It is therefore respectfully submitted that a "federal question" is definitely involved herein, giving this Honor-

able Court jurisdiction; that the fraudulent affidavit filed by Rose Meredith Kessler, deceased, in support of service on the petitioner by publication in the Florida proceedings is of no effect and in itself should nullify said proceedings; and the further fact that the cases of *Sherrer v. Sherrer* (Sup. Ct. Rep. 1097) and *Coe v. Coe* (68 Sup. Ct. Rep. 1094) were decided on June 7, 1948, substantially at the time of the ruling of the Virginia Court herein, wholeheartedly supports the present petition for a rehearing of the petition for writ of certiorari herein.

It is further respectfully submitted that this petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds above specified.

Respectfully submitted,

MARCUS BORCHARDT,  
*Counsel for Petitioner.*